

STATE OF LOUISIANA

VS. DOCKET NO.: 16-CR-159455

BRIAN L. POPE

CLERK OF COURT
PARISH, LA
2019 MAR 18 AM 10: 55

55TH JUDICIAL DISTRICT COURT

PARISH OF LAFAYETTE

STATE OF LOUISIANA



(F)

MOTION FOR JUDGMENT OF ACQUITTAL

NOW INTO COURT, through undersigned counsel, comes the Defendant, BRIAN L. POPE, pursuant to Article 821 of the Louisiana Code of Criminal Procedure, and for his Motion for Judgment of Acquittal, respectfully as follows.

BACKGROUND AND PROCEDURAL HISTORY

Marshal Pope conducted a press conference on October 7, 2015 at the Office of the Marshal for the City Court of Lafayette, addressing first the policy of then Sheriff Mike Neustrom to not book and process illegal aliens arrested for misdemeanor offences.¹ He also referred the news media and the populace to an audio/video recording of Honduran news interview of Sheriff Mark Garber, when an Assistant District Attorney, stating that illegal aliens need not fear deportation when they filed lawsuits.² At the time of the press conference Mark Garber was a candidate for Sheriff and was subsequently elected as Sheriff of Lafayette Parish. Never during the press conference did Marshal Pope urge voters to vote for or against any candidate.

Commencing on October 8, 2015, representatives of The Independent Weekly, LLC filed requests for information from the Office of the Marshal under the provisions of the Louisiana Public Records Law (LA R.S. 44:1-41) relating to the aforesaid press

¹In September of 2014, the Lafayette Parish Sheriff's Office sent a letter to Immigration and Customs Enforcement (ICE), notifying the federal agency that LPSO would not detain booked offenders beyond their sentence without judicial signature or probable cause. <http://theind.com/article-21995-about-those-'sanctuary-cities'.html>

²

https://www.theadvocate.com/gambit/new_orleans/news/the_latest/article_1b8e4c03-a84f-56b7-b382-01e38d1ba7e8.html

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conference. Subsequently The Independent initiated civil litigation in the 15th Judicial District Court seeking production of specified documents (Docket No. C-2015-5737).

During the Louisiana Public Records Law litigation, representatives of The Independent made additional such requests of the Marshal's office and were allowed to amend their petition to add them to the civil litigation. Ultimately, the Marshal was found to be in contempt for failing to produce certain records. Appeals were conducted on behalf of the Marshal.

On August 17, 2016, a grand jury in Lafayette Parish Louisiana returned an indictment (Docket Number 2016-CR-158060) against Marshal Pope charging him with 2 counts of perjury on December 28, 2015 during a civil deposition in violation of LA R. S. 14:123, and 3 counts of "use of public funds to urge an elector to vote for or against a candidate and/or appropriated public funds to a candidate or political organization" on September 23, 2015, October 7, 2015, and between November 10, 2015 and June 2, 2016, all in violation of LA R.S. 18:1465. Subsequently Mr. Pope was indicted in the above captioned matter by another grand jury in Lafayette Parish for two (2) counts of Perjury in violation of LA R.S. 14:123 and five (5) counts of Malfeasance In Office in violation of LA R. S. 14:134 on November 30, 2016. The original indictment was dismissed by the State at defense instigation.

Trial commenced on September 24, 2018 and continued through October 3, 2018 at the Lafayette Parish Courthouse, Lafayette, Louisiana. The defense had subpoenaed Charles Middleton, Marshal Pope's attorney during the responses to the Public Records Law requests by The Independent and the ensuing enforcement civil litigation. Because he had been indicted for perjury, his attorney sought to quash the subpoena and ultimately he did not testify at trial. Several employees of the Office of Marshal for the City Court of Lafayette were called as State witnesses. The jury returned a verdict form, which was read by the clerk aloud:

Count 1: Guilty as charged

Count 2: Not Guilty

Count 3: Not Guilty

Count 4: Not Guilty

Count 5: Guilty as charged

Count 6: Guilty as charged

Count 7: Guilty as charged

RETALIATION FOR EXERCISE OF FIRST AMENDMENT RIGHTS

During the trial testimony was elicited by the State that made it clear that this prosecution was initiated by a request and submission of records from the aforesaid Louisiana Public Records Law civil enforcement by Mr. Gary McGoffin, representing The Independent Weekly LLC, a now defunct printed and online local news outlet. The aforesaid civil litigation and this prosecution both clearly arise from the aforesaid news conference held by Marshal Brian Pope on October 7, 2015. The conference related to the policies of then Sheriff Mike Neustrom that restricted the Office of the Marshal of the City Court of Lafayette and other law enforcement agencies from arresting and booking illegal aliens into the Lafayette Parish Correctional Center on misdemeanor charges. The Marshal also referred to a Honduran news video posted on YouTube in which then candidate for Sheriff, Mark Garber, told news media in Honduras that illegal aliens could file lawsuits without fear of deportation. During the trial testimony was elicited that The Independent did not consider illegal immigration to be an appropriate or substantial issue. Hence, it appears that this prosecution and the civil litigation that preceded it both constituted retaliation for Marshal Pope's exercise of his freedom of expression under the First Amendment to the United States Constitution.

COUNT 1 - PERJURY

The evidence contained in the record is insufficient as a matter of law to support the verdict of finding the Defendant guilty of the offense of Perjury (Count 1). In the State's Bill of Particulars filed on April 4, 2017, it specified relating to this charge:

"As to Count 1:

The defendant committed perjury while under oath on December 28, 2015 at a sworn deposition (which was provided to the defendant) held in the Parish of Lafayette, by denying that he had authorized the distribution of email via third party mass distribution service, when in fact he had authorized such distribution in violation of the provisions of R.S. 14: 123."

There is no evidence contained in the record that the Defendant committed perjury while under oath on December 28, 2015 at a sworn deposition held in the Parish of Lafayette, by denying that he had authorized the distribution of email via third party mass distribution service, in violations of the provisions of R.S. 14:123.

The transcript of the deposition of Marshal Pope at issue (introduced at trial as State Exhibit B-3) reflects that Mr. McGoffin had departed from the purpose of the Louisiana Public Records Law civil enforcement action and was asking about assorted email messages he received from the Lafayette City-Parish Consolidated government:

- "Q All right. This is from Joe Castille at the chadleger.org campaign email address addressed to you, bpope@lafayettegov.net on October 5th. This would have been the day before your notices went out for your October 7th press conference. Do you recall Joe sending you an email with the draft quote for the endorsement that you were going to make of Chad Leger?
- A To endorse Chad Leger?
- Q Uh-huh.
- A Yeah. We talked about the endorsement. But I didn't endorse him that day.
- Q That wasn't my question. My question was, take the time to read this, all the time you need. But it says, "Hey, Brian, here's a draft quote for the endorsement. We can discuss and revised at your convenience. Joe."
- A Uh-huh.

- Q Do you remember receiving an email from him working on the quote that they were going to use in their campaign literature because of your endorsement?
- A Yeah. We were going – I had told them I would endorse Chad Leger.
- Q Okay. And Joe wrote the text for your endorsement?
- A We talked about it. That was what I approved. That's what – I been knowing Chad Leger for that long, yes.
- Q My question is, was this the first draft of that endorsement quote or did you send him a first draft?
- A No. He wrote it up for me.
- Q Okay. And then you looked at it and said, looks good, or –
- A Yeah. I mean, it stood behind what I know about Chad. Yes, sir.
- Q Okay. All right. Now let's go to the next page, 609. And this is from Joe Castille to bpope@lafayettegov.net . It's that same day at 2:15 and the attachment is a draft of the immigration release. And it's a question to you, "Please let me know what you think. Joe." Do you recall receiving that from him?
- A This – is this all together?
- Q Yes, sir. That's the attachment. Now feel free to look at whatever you want to.

[Pope Deposition, page 57, line 4 - page 58, line 25]

The deposition transcript (State Exhibit B-3) discloses that Marshal Pope didn't intend or desire to invite to the immigration press conference all the people that Castille had on his list. This was corroborated during the trial by the personnel from the Marshal's office who testified concerning Marshal Pope's shock and surprise at the people who appeared for the press conference.

- Q Okay. We've talked before about Campaigner and we see at the bottom of Page 618, Campaigner delivered by Campaigner?
- A Yes, sir.
- Q And at the top here it says, "Brian Pope, Lafayette City Marshal at bpope@" – I'm sorry, at – "bpope@lafayettela.gov ."
- A Uh-huh.
- Q That's your city marshal email address, correct?
- A Yes, sir.
- Q That means it's official business?
- A Uh-huh.
- Q And so how did this get sent out with your email address on the top?
- A Like I said, I don't know. I guess, they used my email address to send it out.
- Q Who are they?
- A I don't know.
- Q At the hearing with Judge Edwards you said that there were no advisories. That everything was done by telephone. Would it be fair to say that you did not authorize this?
- A As far – I mean I didn't send -- I didn't email it out through my email.

Q Okay. Now you said earlier that Page 614, the draft of this, may have been done by someone in your office.

A Yes, sir.

Q I'm assuming if it was prepared by someone in your office, you intended to send it out.

A Yes, sir.

Q Okay. And so when this --

A I didn't -- I didn't email it from my office.

Q You indicated earlier, a earlier conversation that or earlier testimony that only phone calls were made. There were no emails, correct?

A Yeah. I didn't email the main outlets. No, I didn't.

Q Okay. Did you email anyone?

A No, sir.

Q Okay. So you prepared a press conference advisory, Page 614, with the intention that it would not be sent to anyone?

A I mean that was handed out when they got there.

Q All right. This was dated -- okay. So this is an advisory to tell them that there's going to be a press conference on October the 7th --

A We called them --

Q -- at 10:30 a.m. And you had a separate press release that you gave them. But you also waited until October 7th to give them this advisory?

A Like I said, we called the main outlets to come.

Q Now I have a whole stack of documents from -- that have your name at the top, Brian Pope, Lafayette City Marshall at bpope@lafayettela.gov. And it's Page 618 through 642. And it's a mix of advisories and the press release. And you can see at the bottom, this went to Ms. Dickerson at lus.org. That would be the Lafayette Utilities Systems. Do you know her?

A No, sir. We ran a search of all the things I sent out.

Q Okay. Do you know Clark --

A No, sir.

Q -- at LUS? Do you know Philippe Gustin at Le Centre for the --

A I mean, I know he works across the street from me.

Q Okay.

A But I don't know him.

Q You didn't intend to send him this email even though it's got your name at the top?

A No, sir.

Q Okay. Same thing for Terry Huval at LUS. You did not intend to send it to him even though your name and email address are at top?

A No.

Q Do you know Dave Domingue?

A Yeah. He works across the street to.

Q Did you intend to send him this email that's got your address on it?

A No, sir. Excuse me. Like I said, they had people show up that I don't know who they were.

Q Okay.

A Some of them were just regular people."

[Pope Deposition, page 63, line 19 - page 67, line 7]

It is clear from the transcript of Marshal Pope's deposition that he did not understand what the Campaigner software used by Joe Castille did and he didn't realize he was triggering an email bombardment to people he would never have invited to the immigration press conference when he clicked a button on the Castille email. It is also clear that during the deposition that he did not have a good recollection of the events leading up to the press conference. It is also clear he had no opportunity prior to the deposition to carefully review the email messages provided by the Lafayette City-Parish Consolidated Government to Mr. McGoffin. Errors and misunderstandings are not the basis for a perjury charge, which requires mens rea.

Further, the testimony at trial on September 27, 2018 of Hillary Joseph Castille, a government witness, sets out in pertinent part:

- "Q That's okay. All right. You testified earlier that you had some software or a program you used that would send out press releases and press advisories; is that right?
- A You actually can send out anything. The press releases that you might use something like PR news wire, because they have media outlets.
- Q Right.
- A This is something where you can put any current email and send anything out. It could be an invitation to a birthday party. But that's what I use for press releases and updates for supporters, all that sort of thing.
- Q So, did you use any software program in order to send out the press release and press advisory?
- A Yes, sir. I use the campaigner to send out both the press advisory, I guess the day before the press conference. And then the press release after the press conference.
- Q Okay. Tell me, how does that work? Do you think you sent it from your email address?
- A No, sir. I asked -in the software you can't send it from an email address that you don't control. If you're going to send it from someone else's email address, you have to get permission. And, so, it didn't go from me or any of my email addresses; it went from Marshal Pope's email address.

- Q Okay. And, so, did you talk to Marshal Pope about sending this press advisory out?

- A No. I think at one point we just had a brief conversation where I told him I needed his email address and that I would need his permission to send it out.
- Q Okay. And did you explain to him that you were going to send out this advisory?
- A Yeah. I think I said my email software, but I did tell him I was going to send it out and I needed his permission."

[Trial Transcript Excerpt Hilary Joseph Castille, page 11 line 32 through page 13, line 16]

Clearly, Mr. Castille had a subscription to the Campaigner software that he used to generate the email press conference advisory, which was not a "... mass distribution via third-party vendors..."

- Q So I think you explained earlier that you had that software with the flyer and you had his email address to offer, right?
- A Yes, they would have to approve it.
- Q Okay. Can you identify this?
- A It looks like an email from the software to confirm an email.
- Q Okay. And do you see who it is sent to, at the top?
- A It says sent to bpope@la.gov.
- Q Is this the email that would have gotten sent from Campaigner so that person could authorize the email?
- A That's my assumption."

[Trial Transcript Excerpt Hilary Joseph Castille, page 13, lines 21 through 32]

- Q Do you remember exactly when you were authorized or asked Campaigner to send the advisory out?
- A Sometime before they got sent out, I mean, if you showed me the thing again, that would probably tell me.
- Q Yes. Is this the date and time?
- A Yes, October 6 at 3:31."

[Trial Transcript Excerpt Hilary Joseph Castille, page 14, lines 5 through 10]

- Q Okay. And just to be clear, this email that you have to click in order for you to be able to use the email address, would you have sent out this press advisory until this email was clicked?
- A I could not have sent out that press advisory from that email address without permission.
- Q Okay. And did Marshal Pope authorize you to use Campaigner to send out the press advisory?
- A Well, he gave me permission to send out the advisory, so I don't recall mentioning Campaigner or really explaining the process of it, other than I needed him to click on it. You know what I'm saying?
- Q To send it out?
- A Yes, send it out.

- Q But did he know that you were going to send it out using software at was going to send it out to a bunch of people?
- A I would suppose."

[Trial Transcript Excerpt Hilary Joseph Castille, page 14, line 13 through page 15, line 11]

Hence, the email from Castille conveying the press conference advisory to Marshal Pope had at the bottom, following the wording of the advisory, a button that, by its presence alone, the Marshal was invited to "click".

- Q Okay. So, I want to be clear out this —about how this press release got sent out. Did the Marshal ever request that you send it out?
- A I don't have a specific recollection of a conversation, but I'm sure he did. I mean, I wouldn't have if he didn't."

[Trial Transcript Excerpt Hilary Joseph Castille page 15 lines 16 through 21]

- Q My question is: Did Marshal Pope request that you send this advisory by email?
- A Yes, I guess.
- Q Well, didn't you say that in the Grand Jury?
- A May I see that? I'm sorry. Yes. He requested it and I sent him the verification.
- Q Okay. So now that you've looked at your testimony, I want to make sure I get the sequence of events right. So, Marshal asked you to send out the press advisory.
- Q Did the Marshal ask you to do a press release and press advisory?
- A He asked me to do a press release. I actually did the press advisory because I understood that before you do a press release, you do an advisory first. So, yes, he asked me to do a press release.
- Q Okay, fair enough. And did the Marshal ask you to send that advisory and reach out by email?
- A Yes.
- Q And did you, in fact, prompt him in a request to use his government email address to send that out?
- A Yes.
- Q And did you get authorization to use that government email address to send it out?
- A Yes. I'm not exactly sure what that means. I'm not a lawyer. But I got Campaigner dot something back and, so, suddenly I could send the email. Before I couldn't and then I could. So I guess that meant that he had clicked on something and done what he was supposed to do.

[Trial Transcript Excerpt Hilary Joseph Castille, page 16 line 8 through page 17 line 7.]

Castille was not at all clear he had explained to Marshal Pope how the Campaigner software worked. Castille could not send the advisory under the

Marshal's email unless the Marshal Clicked the button on the email. He assumed he had been given a knowing consent without having explained how the software worked. Because of the implied threat of perjury charges, Castille was much more circumspect on redirect examination.

Subsequently the transcript disclosed more of Mr. Castille's testimony on direct examination:

“Q Just to clarify, earlier I asked you whether or not you explained to Marshal Pope the process by which you would be able to send out these emails. Do you remember explaining that to him?

A I think I told him that it needed to be authorized, his email address needed to be authorized. I don't know how I worded it.

Q And, so, do you think it would help if you could look at your testimony from the Grand Jury?

A Yes.

Q I'm going to direct you to line 17.

A Okay.

Q Does that refresh your memory about whether you explained the process?

A Yes. I told him I needed his email address and a telephone number for who was going to be on the press release and then I was going to send it out with the email software and I needed him to tell me the email I put into the software and the software will send the email to whoever owns that email account.

Q So that refreshed your memory?

A Yes.

Q So,

A So that's what I explained.

Q Okay. Just to make sure I'm clear. Did you explain to Marshal Pope the process by which you wrote the extended emails out using your email software?

A Yes.”

[Trial Transcript Excerpt Hilary Joseph Castille, page 19, line 25 through page 20, line 20]

During cross examination by Mr. McLindon of Mr. Castille, it became more apparent that Castille had not clearly advised the Marshal what his clicking on the button on the Campaigner email would do:

Q Okay. In the fall of 2016, was immigration a legitimate public concern?

A In the fall of 2015.

Q I keep saying that, 2015.

A Well, Mr. Trump had entered the presidential race in the summer and immigration became a large issue. And then on Facebook we discovered that we had been nominated a sanctuary city. And, so, it became an issue in the campaign.

Q So this immigration issue wasn't just some hocus pocus thing; this is a legitimate issue.

A Well, there was a local publication that thought it was not a legitimate issue and there was controversy that surrounded that. But I certainly thought it was a legitimate public policy issue.

Q Now, you could look at whatever is easier for you, Mr. Castille. If you want to look in my binder. It's already been identified. It's Tab 14 in my binder. You have that?

A Yes.

Q This has been introduced into evidence. This is an email from you to Brian Pope, right?

A Yes, sir.

Q This has been introduced into evidence. This is an email from you to Brian Pope, right?

A Yes, sir.

Q And in the subject line it says, "Draft "For Leger endorsement," right?

A Yes.

Q And then you say, "Hey, Brian. Here's a draft for endorsement. We can discuss at your convenience."

A Yes, sir.

Q And then below that is the endorsement.

A Yes.

Q Now, that didn't go public until a week or two later; is that right?

A Yes.

Q The actual endorsement didn't come out until much later.

A I honestly can't remember.

Q Okay.

A That seems logical. We would have done it a little closer to the election.

Q And when you talked to Mr. Pope, I think you already said it. It was clear he wanted to keep -it was clear he was going to endorse Chad, right?

A Yes.

Q No question.

A No, sir.

Q He had supported him.

A Yes, sir.

Q But you, as a consultant, you wanted the public endorsement, right?

A Yes, sir. And also, depending on the campaign timing, you take a look at that earlier or later in the campaign.

Q But when you first talked to Marshal Pope, he made clear that was an immigration endorsement of Chad?

A No, he didn't ever say that, but I do recall that when he called me about the press release, he didn't talk about the endorsement or the campaign; he talked about those two issues.

Q Thank you.

A So he didn't talk about that.

Q He didn't use those words.

A Right.

Q I understand. Thank you. So, again, looking at the endorsement, I mean, there's no question. Anybody who would read would know what that's

about, right? A Right. Q I mean, it says it in the subject line. And then you tell them what it is.

A Right.

Q Okay. Now let's go to the third exhibit 15. Again, it's already in evidence. That's an email from you to Mr. Pope, right?

A Yes.

Q The subject line says "Draft of immigration release. "

A Yes, sir.

Q And you say, "Please let me know what you think."

A Yes, sir.

Q And then attached to it is the immigration release, right?

A Yes, sir.

Q It's pretty clear what that is. Mr. Pope could see that pretty clear in the subject line and reading it what that is. That's the draft of the immigration release.

A Yes, sir.

Q All right. Let's go to the next one, Tab 15. You start this one kind of from the bottom. Not all the way to the bottom. You see October 6, 2015, at 12:09 P.M.

A Let me find it.

Q I'm on Tab 16 .

A I am too, but what I'm looking at is October 6 at 1:30.

Q Go down a little farther, about halfway down.

A Oh, I see it. Okay, yes. October 6 at 12:09.

Q That's an email from you?

A Yes.

Q To Marshal Pope.

A Yes, sir.

Q "Hey, Brian. Please see media advisory and statement attached. please note I changed the letter a little and added something to the bottom calling for Garber to apologize." Right?

A Yes, sir.

Q And then he responds, "Looks good."

A Yes, sir.

Q Pretty clear what that is.

A Yes.

Q Anybody who got that would know what that is.

A Yes, sir.

Q All right. Now, let's go to 17. You see that?

A Yes, sir.

Q That's the Campaigner email that we talked about earlier. Okay. Now, in your telephone conversation with Marshal Pope, can you say with certainty that you used the word "Campaigner" with him?

A I can't. And I kind of doubt I did. And I think I would have said "email software," probably.

Q Okay.

A I think.

Q You probably never said "Campaigner."

A I couldn't tell you. And I don't know if it would have stood out in my mind if I had. I don't know.

Q Now, the next one, this is not something coming from you, but this is actually coming from a computer.

A It's coming from the email software service.

Q Now, let me ask you this. In your line of work, do you ever use third party vendors?

A I'm not sure. No. I might use a mail house to mail things. Or I might use some video or something like that.

Q So that would be a third party vendor, help you with a video, help you with the mailing, any number of third party vendors?

A Right.

Q Okay. When you worked with when you were in conversations and discussions with Marshal Pope in this email, did you use any third party vendors for additional help?

A With me and him talking?

Q Did you use any third party vendors?

A Well, I'm not real sure what you mean.

Q Well, you stated an example.

A Well, we didn't copy other people, if that's your question.

Q You didn't talk to any other people, just y'all two?

A Right.

Q Now, let's go to this email again. Is this the email that Brian Pope would have had to click on?

A I have never seen this but it looks like the type of email that Campaigner sends out for confirmation. I mean, this is like Gary McGoffin used to talk to him.

Q Do you know why Gary McGoffin's name is on top of that?

A I guess he provided it to us. I don't know. I have no idea.

Q I don't know either. You don't know why?

A No, sir.

Q In fact, you raised an interesting point. When was the first time you saw this?

A I don't remember. I think they showed it to me at the Grand Jury meeting.

Q Okay. So, you're a year or two after it was sent out.

A Yeah. Sometime in 2016, maybe in the spring.

Q And the reason you kind of didn't recognize it is because this doesn't come from Joe Castille; this comes from some software program.

A Yes. It's an automated kind of -there are several of them. One is called "Mail Champ," and, you know, there are different kinds. It comes from the service to whoever is the owner of the email address to make sure that unauthorized emails are not sent out without permission.

Q Now, is there anywhere on this email that there's the word "immigration"?

A No.

Q How about press release?

A No.

Q How about press conference?

A No.

Q Garber?

A No.

Q Leger?

A No.

Q In fact, am I correct that the word "campaign" or "Campaigner," appears ten times on this document? You can count them if you want.

A I only count seven.

Q Wrong but close enough.

A Yes, sir.

Q And you testified earlier that you don't really remember using the word "Campaigner" talking to Mr. Pope on the telephone. You can't be sure you ever used that word.

A My guess is that I would have just said "email software."

Q Okay. NOW, apparently somebody clicked on this. And whoever clicked on it, it then went back to this software Campaigner, and then Campaigner was able to send out a last email that looked like it came from Brian Pope; is that right?

A That's how it works.

Q Okay. Now, is there any document that either I haven't shown you or Mr. Haney hasn't shown you? Is there a document out there that actually says that?

A I'm sorry?

Q Is there an email or document between you and Mr. Pope that says: This is going to blast out an email to a large group of people? Are you aware of any such document?

A No, sir.

Q The thing that got blasted out to this group was the press conference advisory.

A Yes, sir.

Q And is there anywhere either on this document or the press conference advisory that has a list of the people to whom it was sent?

A No, sir.

Q Okay. You know, sometimes you see a letter or document and in the bottom left corner it has "cc" or whatever and it lists a bunch of people. Is there any such document like that that would let Mr. Pope or anybody know to whom this email was going?

A I can't say unequivocally there isn't but I'm not aware of anything like that.

Q You don't have one, do you?

A No, sir. No. I mean, I know it's been a while, but I know who was in my email list, but I have no idea about any document like that.

Q So you have an email list, right?

A Yes, sir.

Q That you created.

A Yes, sir.

Q Did you show that to Brian Pope?

A No, sir.

Q Did you tell him who was on the list?

A No, sir.

Q Did he give you any names and say: Put this on the list?

A No, sir.

Q Okay. You did ask Marshal Pope would you do an endorsement for Chad Leger, right?

A I would guess the Chief asked him that, but, I mean, I knew that he was planning to endorse the Chief.

Q By the way, when you and Brian Pope were having emails and phone calls at least in this two or three day period, did you ever call Chad Leger and tell him about that?

A No, sir.

Q Did you ever ask Brian Pope to do a TV commercial for Chad Leger?

A I would guess the Chief probably would have asked him that.

- Q But, in fact, he didn't do a TV commercial, did he?
- A No, sir. He didn't.
- Q Now, I know I've asked you, but this Campaigner software sends out these emails to somebody who needs to click on it. Could you click on it on a Smartphone? Could you use a Smartphone to to click on it?
- A If you have your email on your phone and you got on email, you could click on it on your phone.

[Trial Transcript Excerpt Hilary Joseph Castille page 23 line 14 through page 31 line 18.]

The jury's instructions at trial read:

- **Count 1:**
- **Thus, in order to convict the defendant of perjury, you must find:**
- **(1) that the defendant testified in civil deposition which was taken on December 28, 2015 in Lafayette Parish; and**
- **(2) that the defendant's testimony that he had no knowledge of the use of a third party mass distribution of emails was false; and**
- **(3) that the testimony was given under oath or equivalent affirmation; and**
- **(4) that the defendant knew the statement was false when he made it; and**
- **(5) that the testimony related to a matter material to the issue (the Public Records Law or question in controversy.**

"MUST RELATE TO MATTER MATERIAL TO THE ISSUE OR QUESTION IN CONTROVERSY"

La.R.S. 14:123 provides in pertinent part that:

Perjury is the intentional making of a false written or oral statement in, or for use in, a judicial proceeding, or any proceeding before a board or official, wherein such board or official is authorized to take testimony. In order to constitute perjury the false statement must be made under sanction of an oath or an equivalent affirmation, and must relate to matter material to the issue or question in controversy.

It is a necessary element of the offense that the accused knew the statement to be false; but an unqualified statement of that which one does not know or definitely believe to be true is equivalent to a statement of that which he knows to be false.

During the trial, the State was required to prove each essential element of the crime beyond a reasonable doubt. Therefore, the State had the burden of showing that the defendant knowingly made a false statement under oath in a judicial proceeding and that the statement related to a matter material to the issue or question in controversy.

There is very little Louisiana jurisprudence to aid in the interpretation of the perjury statute. The court in *State v. Marrero*, 525 So.2d 203 (La.App. 5th Cir. 1988) looked to federal cases interpreting 18 U.S.C. § 1623(a) which is similar to the Louisiana perjury statute. In *Marrero*, the court adopted the test for materiality as set out in *United States v. Giaratano*, 622 F.2d 153, 156 (5th Cir.1980) stating that:

The test for materiality is a broad one— whether the false testimony was capable of influencing the tribunal on the issue before it. Furthermore, we have held that 'the statements need not be material to any particular issue but may be material to any proper matter of inquiry.' (citations omitted)

LOUISIANA PUBLIC RECORDS LAW

The Louisiana Supreme Court explained Louisiana public records law as follows:

The legislature, by enacting the "Public Records Law" (LSA-R.S. 44:1 et seq.), sought to guarantee, in the most expansive and unrestricted way possible, the right of the public to inspect and reproduce those records which the laws deem to be public. There was no intent on the part of the legislature to qualify, in any way, the right of access. See *Landis v. Moreau*, 00-1157 (La.2/21/01), 779 So.2d 691, 694-95.

The legislature has recognized that it is essential to the operation of a democratic government that the people be made aware of all exceptions, exemptions, and limitations to the laws pertaining to public records. LSA-R.S. 44:4.1(A). In order to foster the people's awareness, the legislature declared that all exceptions, exemptions, and limitations to the laws pertaining to public records shall be provided for in the Public Records Law or the Constitution of Louisiana. *Id.* Any exception, exemption, and limitation to the laws pertaining to public records not provided for in the Public Records Law or in the Constitution of Louisiana has no effect. *Id.* Thus, access to public records can be denied only when the Public Records Law or the Constitution specifically and unequivocally provide otherwise. See *DeSalvo v. State*, 624 So.2d 897, 902 (La.1993), cert. denied, 510 U.S. 1117, 114 S.Ct. 1067, 127 L.Ed.2d 386 (1994).

As with Article XII, Section 3, the Public Records Law should be construed liberally in favor of free and unrestricted access to public documents. *Landis v. Moreau*, 779 So.2d at 695; *Title Research Corporation v. Rausch*, 450 So.2d 933, 937 (La.1984). Whenever there is doubt as to whether the public has the right of access to certain records, the doubt must be resolved in favor of the public's right to see; to allow otherwise would be an improper and arbitrary restriction on the public's constitutional rights. In re *Matter Under Investigation*, 07-1853 (La.7/1/09), 15 So.3d 972, 989; *Capital City Press v. East Baton Rouge Parish Metropolitan Council*, 96-1979 (La.7/1/97), 696 So.2d 562, 564; *Title Research Corporation v. Rausch*, 450 So.2d at 936.

Shane v. Par. of Jefferson, 14-2225, pp. 9-10 (La. 12/8/15), 209 So. 3d 726, 734-35.

La. R.S. 44:1(A)(2)(a) defines a public record as:

All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, are "public records", except as otherwise provided in this Chapter or the Constitution of Louisiana.

In *Shane*, the Louisiana Supreme Court stated that "[c]learly 'electronic mail,' or 'email,' falls within the definition of 'letters,' despite generally lacking a physical form and though usually stored in an electronic format, and, if used in the performance of any work, duty, or function of a public body, under the authority of state or local law, should be deemed a 'public record.'" 14-2225, pp. 10-11, 209 So. 3d at 735-36.

Documents that may otherwise be Public Records are exempted from inclusion if the Louisiana Constitution provides an exemption. The constitutional right of privacy in Louisiana arises from Article I, Section 5 of the Louisiana State Constitution, which states, "every person shall be secure in his person, property,

communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy.” The court has consistently held that the right to privacy in Louisiana can be described as the right to be left alone and to be free from unnecessary public scrutiny. *DeSalvo v. State*, 624 So.2d 897 (La. 1993).

In the litigation process of the *Shane* case before the Louisiana Fifth Circuit Court of Appeal, the court reversed the district court decision and granted granted Shane injunctive relief.³ First, the Fifth Circuit considered the question of whether the emails were public records. The Circuit reasoned that emails generated and received by an employee at a public employer's email address, and maintained on computer equipment owned and controlled by the employer that were not used or prepared for the employer's use or performance of its business, did not fall within the definition of public records under the state's public records law.⁴ The Circuit further found there was no evidence that the individuals who generated or were recipients of the emails were acting on behalf of the public employer and there were no pending investigations concerning the public employee's possible misconduct, which might have justified seizure of emails. The Fifth Circuit concluded that the emails were purely private communications between private citizens concerning private political activity, and the content of the emails has nothing to do with the business of JEDCO.

The Fifth Circuit then considered whether Shane, as a non-employee third party, was entitled to assert Louisiana state constitutional rights of privacy and association, as a private citizen, relative to the emails. The Fifth Circuit concluded that Shane, as a private citizen, had a reasonable subjective expectation of privacy in his email correspondence with the JEDCO employee, notwithstanding the fact that the emails were sent to a large number of individuals involved in political activity

³*Shane v. Parish of Jefferson*, 13-0590 (La.App. 5 Cir. 9/24/14), 150 So.3d 406.

⁴ Here the email messages at issue were not generated on computer equipment owned by a public employer or governmental unit, but on the computer of Hilary Castille.

where the non-employee third party testified that he believed recipients of the emails involved in political activity would keep the communication private, and that if one attempted to obtain emails from the other members "[t]hey won't give it to you, they're private." The 5th Circuit further reasoned that because the right to privacy extended equally to content of private email messages as it did to names of other correspondents, even with redaction of identities of all persons reasonably believed to have been private citizens, a private citizen's constitutionally protected rights of privacy and of freedom of association outweighed need for disclosure under Public Records Law.

The media-intervenors sought review of the appellate court decision to the Louisiana Supreme Court, which granted a writ of certiorari.⁵

The Louisiana Supreme Court reversed the 5th Circuit Court of Appeal and reinstated the district court's ruling. First, the Court reaffirmed the broad scope of the public records law:

The legislature, by enacting the "Public Records Law" sought to guarantee, in the most expansive and unrestricted way possible, the right of the public to inspect and reproduce those records which the laws deem to be public. There was no intent on the part of the legislature to qualify, in any way, the right of access. . . .

[A]ccess to public records can be denied only when the Public Records Law or the Constitution specifically and unequivocally provide otherwise.⁶

The Court held that the emails fell within the broad definition of public records because they "were used in JEDCO's regular business, transactions, work, duties or functions" in that the emails were used in the audits of the agency's operations. There had not been any governmental audit of the Office of the Marshal for the City Court of Lafayette that converted email exchanges between the Marshal and Joe Castille, not relating to the operation of the Marshal's Office, into public records.

⁵*Shane v. Parish of Jefferson*, 14-2225 (La.2/6/15), 157 So.3d 1137

⁶ *Shane* at 5 (internal citations omitted).

The Court then considered whether Shane, as a non-employee third party, could assert any exceptions to the public records laws, specifically the Louisiana state constitutional rights of privacy and association. The Court found that the content of the emails "consisted of the discussion of private political matters which had nothing to do with JEDCO's operations" and held that Shane, as a non-employee third party, could assert rights of privacy and association in the emails. Therefore, the Court concluded, these "rights must be balanced against the right of the public to inspect the records."

The Court held that upon balancing the public's right to inspect the emails against the private citizen's constitutional rights of freedom of association and privacy, the latter may be adequately protected by redacting identifying information, which should include the names, addresses, email addresses, phone numbers and places of employment of all private citizens, before releasing the emails. Information about JEDCO employees, elected officials and candidates for public office were not required to be redacted. No such redaction was effected by the Lafayette City Parish Consolidated Government when it released email between Marshal Pope and Joe Castille.

The right to privacy of government workers in the workplace was addressed by the U.S. Supreme Court in *O'Connor v. Ortega* (1987).⁷ In that case, the public employer searched an employee's office as part of a non-criminal investigation, which search included the employee's desk drawer and file cabinets. Although *O'Connor* is a plurality opinion, the justices unanimously affirmed the Fourth Amendment's application to non-criminal investigations in the workplace of public employers. Further, the justices unanimously recognized the public employee's protected privacy interest in his desk and filing cabinet because he had exclusive use of them and stored personal items there.

⁷*O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987).

In a Louisiana Public Records Law enforcement civil suit, a requester may seek mandamus, injunctive relief, declaratory relief, attorney's fees, costs and damages.⁸ The requester must sue in the parish where the custodian's office is located, and the court must try the suit by preference using summary procedure.⁹ The court reviews the custodian's determination de novo, and the custodian bears the burden to justify withholding records.¹⁰ A requester who prevails in such a suit "shall be awarded reasonable attorney's fees and other costs of litigation;" where the request prevails only in part, the court has discretion to award reasonable attorney's fees.¹¹

The Louisiana Public Records Law lets requesters recover actual damages caused by an arbitrary and capricious denial of access or an unreasonable or arbitrary failure to respond timely.¹² An untimely response, if unreasonable or arbitrary, also may justify a discretionary award of civil penalties up to \$100 per day.¹³

A reading of the entire transcript of Marshal Pope's deposition makes clear that the enforcement action against Marshall Pope had been carried by Mr. McGoffin far from summary procedure and the questions being asked were more in the nature of a news investigation rather than whether the email being sought were public records or whether an exemption applied. Besides, the *Independent* had already obtained the messages they sought from the Lafayette Consolidated Government, which Marshal Pope had not had an opportunity to examine prior to the commencement of the deposition. Hence, the questions being asked that evoked the

⁸La. R.S. 44:35(A).

⁹La. R.S. 44:35(C).

¹⁰La. R.S. 44:35(B).

¹¹La. R.S. 44:35(D).

¹²La. R.S. 44:35(E)(1).

¹³*Id.*

response serving as the basis for the perjury charge were not material to a Louisiana Public Records Law enforcement suit.

The crime of perjury consists of a deliberate material falsification under oath.¹⁴ Accordingly, the prevailing view in federal and state courts has been that a witness's correction or his effort to correct inaccurate testimony is admissible evidence probative of the conclusion that initial inaccuracies or omissions were indeed not deliberate falsifications.¹⁵

The range of proof which is admissible as material to a witness's lack of intent to testify falsely is extremely broad.¹⁶ A witness's subjective misunderstanding will

¹⁴The federal general perjury statute, and the model upon which state codes have been drafted, reads as follows:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. § 1621 (1948). All state statutes and the Model Penal Code follow this federal rule requiring that perjury be deliberate to be criminally culpable. See American Law Institute, MODEL PENAL CODE § 241.1 (Proposed Official Draft, 1962).

¹⁵Most federal and state courts agree that evidence of recantation of a prior false declaration is relevant to show that the initial falsehood was not perjurious because it lacked the essential element of willfulness. It is also agreed that a witness's non-responsive answer is not perjury if it results from a mistake, misunderstanding or an inadvertent omission, that the determination of perjury requires evaluation of a witness's entire testimony and, consequently, that a witness's correction of his false testimony may be considered when making the overall evaluation.

The solidarity of judicial acceptance of this principle is emphasized by noting that courts which follow the completed crime rule and deny the recantation defense after perjury has been committed, as well as those courts which do allow recantation, agree with the willfulness requirement. See, e.g., *United States v. Kahn*, 472 F.2d 272, 284 (2d Cir.), cert. denied, 411 U.S. 982 (1973); *United States v. Lococo*, 450 F.2d 1196, 1198 n.2 (9th Cir. 1971); *Beckanstin v. United States*, 232 F.2d 1, 4 (5th Cir. 1956); *United States v. Rose*, 215 F.2d 617, 623 & n.5 (3d Cir. 1954); *Seymour v. United States*, 77 F.2d 577, 581-83 (8th Cir. 1935); *People v. Baranov*, 201 Cal. App. 2d 52, 59-60, 19 Cal. Rptr. 866, 870-71 (Dist. Ct. App. 1962); *State v. Fasano*, 119 Conn. 455, 461, 177 A. 376, 378 (1935); *State v. Brinkley*, 354 Mo. 337, 352, 189 S.W.2d 314, 320 (1945); *People v. Brill*, 100 Misc. 92, 102, 165 N.Y.S. 65, 71 (N.Y. County Ct. Gen. Sess. 1917); *Kern v. United States*, 169 F. 617, 619-20 (6th Cir. 1909). Cf. *Humes v. United States*, 186 F.2d 875, 878 & n.3 (10th Cir. 1951).

¹⁶Courts will decide whether prior erroneous testimony was given deliberately by considering subsequent corrections in the context of the total circumstances of the witness's testimony. For example, the New York Supreme Court dismissed an indictment for perjury when

be admissible evidence,¹⁷ as will his cultural heritage of lack of mental competence.¹⁸

"The promptness with which a witness corrects himself, his motive for doing so, the kind magnitude of inaccuracy and the witness's own explanation for the inaccuracy are also material to show absence of perjurious intent. Some courts have indicated in dicta that any evidence competent to explain away the false testimony will be admissible whenever it shows reasons disassociated from a willful or corrupt intention to deceive.¹⁹ Consequently, there is general agreement that a witness may offer his correction of prior false testimony as probative evidence that he had never intended to testify falsely.²⁰ Although a charge of immateriality will not generally prevent offered proof from being admitted in evidence, it may influence how that evidence is subsequently weighed in reaching a judgment or in deciding what sentence should be imposed.²¹

the defendant convinced the court that his original testimony that he had not signed a certain paper which he had in fact signed was falsely given because his "attention was not at first directed to the particular paper" which he was asked to identify. *People v. Brill*, 100 Misc. 92,102, 165 N.Y.S. 65, 71 (1917). The court was persuaded by the fact that defendant corrected himself as soon as a photographic copy of the document was shown him. On the other hand, the New York Court of Appeals did not give the benefit of the doubt to a witness who "was no novice on the stand." *People v. Ezaugi*, 2 N.Y.2d 439, 444, 141 N.E.2d 580, 583, 161 N.Y.S.2d 75, 78 (1957). In that case, because of the declarant's experience as a witness, the court interpreted the correction as no more than a calculated effort to escape the dire consequences of admitted false swearing, an effort made only because the state had shown the witness incontrovertible proof of his perjury.

¹⁷ See, e.g., *Beckanstin v. United States*, 232 F.2d 1 (5th Cir. 1956).

¹⁸ See, e.g., *United States v. Rose*, 215 F.2d 617 (3d Cir. 1954); *Thrasher v. State*, 31 Okla. Crim. 95, 237 P. 139 (1925).

¹⁹ See, e.g., *State v. Fasano*, 119 Conn. 455, 177 A. 376 (1935).

²⁰ The Supreme Court of Indiana approved a trial court's instruction that a witness's correction per se "rebutted the wilful and corrupt intent necessary to constitute perjury." *Henry v. Hamilton*, 7 Blackf. 506, 507 (1845). A California district court held that prejudicial error had been committed by a lower court in refusing to instruct that correction of testimony or attempt to correct testimony by a witness charged with perjury may be valuable to show no intent to testify falsely. Under California law "correction during the trial [is] evidence which may be considered of some value in determining the question of fact on whether or not the witness did or did not have wilful intent to testify falsely." *People v. Baranov*, 201 Cal. App. 2d 52, 60, 19 Cal. Rptr. 866 (Dist. Ct. App. 1962). In the extreme case, evidence of a correction has been so potent that the court dismissed the perjury indictment. *Bijur v. Bendix*, 285 F. 974 (D.C. Cir. 1923).

²¹ See, e.g., *People v. Baranov*, 201 Cal. App. 2d 52, 19 Cal. Rptr. 866 (Dist. Ct. App. 1962). Most courts have weighed evidence bearing on the intent of witnesses accused of perjury simply by considering probable intent in the light of all evidence presented, but some courts

Under the contextual analysis of the deposition testimony of Brian Pope an absence of intent to deceive is established, because when his deposition testimony is considered as a whole, the alleged perjury is modified or elaborated by subsequent remarks so that the net effect of the entire testimony is to give a truthful picture of the facts sworn to, thereby destroying the premise on which the perjury allegation rests.

COUNT 5 - MALFEASANCE IN OFFICE

The evidence contained in the record is insufficient as a matter of law to support the verdict of finding the Defendant guilty of the offense of Malfeasance in Office (Count 5). There is no evidence contained in the record that the Defendant committed malfeasance in office between November 10, 2015 and June 2, 2016 by intentionally using public funds for a political purpose to with the payment of public funds for an attorney to prepare and draft a motion to unseal the divorce records of Mr. Mark Garber a candidate for sheriff. During the trial CPT Clause testified that Marshal Pope did not examine the bill sent to the Marshal's Office by Charles Middleton, who had been retained to and was representing the Marshal and his office in the Public Records Law civil litigation (*The Independent Weekly v. Lafayette City Marshal Brian Pope*, Docket No. 2015-5737, 15th Judicial District Court, Parish of Lafayette, State of Louisiana). Hence, Marshal Pope did not see the "Redmond Motion" entry on the Middleton legal fees invoice, and assumed the entire invoice related to his Louisiana Public Records Law representation.

Further, documents were introduced during the criminal trial that when Charles Middleton was advised of a Public Records request relating to this part of his

have relied almost exclusively on interpreting the meaning of the alleged perjurious remark in the linguistic context of defendant's entire testimony. See *People v. Gillette*, 126 App. Div. 665, 111 N.Y.S. 133 (1908). Under the contextual analysis the witness tries to prove absence of intent to deceive by showing that when the testimony is considered as a whole, the alleged perjury is modified or elaborated by subsequent remarks so that the net effect of the entire testimony is to give a truthful picture of the facts sworn to, thereby destroying the premise on which the perjury allegation rests.

invoice, he advised the Marshal's Office it was erroneous billing and sent a refund money order. Hence, there is no evidence of specific intent to violate a duty. There is no further evidence that Marshal Pope violated his lawful duty to not use public funds for political purposes to urge an elector to vote for or against a candidate or to be appropriated to a candidate or political organization in violation of LA R.S. 18:1465 and LA Const. Art 11 Section 4, his duty to not loan, pledge or donate to any person the funds, credit, property, or things of value of the State or any political subdivision in violation of LA Const. Art 7 Section 14, his duty to not misappropriate, misapply, convert, misuse, or otherwise wrongfully take any funds, property or other thing of value belonging to or under the custody or control of the public entity in which they hold office or are employed in violation of LA R.S. 42:1461.

The jury's instructions at trial read:

- **Count 5**
- **The Defendant:**
- **(1) Was a public officer**
- **(2) He had a duty: 1. To not use public funds to urge a voter to vote for or against a candidate or organization, (and/or) 2. To not unlawfully loan, pledge, or donate to or for any person or association except as allowed (and/or) 3. To not misapply, convert, misuse or otherwise wrongfully take any funds they control as the office holder.**
- **(3) That he intentionally refused, failed or unlawfully performed those duties unlawfully, used, misapplied, misused and donated public money to hire a lawyer to draft a motion to unseal the divorce records of Mark Garber thereby seeking to urged voters to vote against Mark Garber, a candidate for sheriff as well as appropriated the resources of his office to Watch Dog Political Action Committee.**

Under this statute, the state must prove the existence of a law or statute imposing an affirmative duty on the defendant as a public officer and that the defendant intentionally refused or failed to perform that duty or intentionally performed that duty in an unlawful manner. *State v. Davis*, 93-0599 (La. 4/11/94), 634

So.2d 1168, 1170. The duty must be one expressly imposed by law on the public officer because the officer is entitled to know exactly what conduct is expected of him in his official capacity and what conduct will expose him to criminal charges. *State v. Perez*, 464 So.2d 737, 741 (La. 1985). Intent is likewise an essential element of the offense. As the Louisiana Supreme Court explained:

Louisiana R.S. 14:134 does not criminalize all ethical violations and/or general derelictions of duty. The object of the malfeasance statute is to punish a breach of duty committed with the required culpable state of mind. To this end, the statute expressly limits its application to instances in which a public officer or employee **intentionally** refuses or fails to perform or **intentionally** performs in an unlawful manner, any affirmative duty imposed by law upon him in his role as a public servant. The inclusion in the statute of a criminally culpable state of mind makes it clear that it applies only where the statutorily required mens rea is proven beyond a reasonable doubt. Thus, mere inadvertence or negligence, or even criminal negligence, will not support a violation of the malfeasance statute because the statute specifies the act or failure to act must be intentional.

State v. Petitto, 10-0581, p. 13 (La. 3/15/11), 59 So.3d 1245, 1254 (emphasis in original).

Citing *Petitto*, the Louisiana Supreme Court declared that in reference to malfeasance in office:

Specific intent in this context is statutorily defined as “that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act.” La. R.S. 14:10(1). As a state of mind, specific intent need not be proved as a fact, but may be inferred from the circumstances of the transaction and the actions of defendant. *State v. Graham*, 420 So.2d 1126, 1127 (La. 1982).

State v. Thompson, 2015-K-0886, p. 26 (La. 9/18/17).

There is no evidence that Marshal Pope specifically intended to extend public funds for an improper purpose since he was not aware Middleton’s bill included anything other than his work on the Louisiana Public Records Law civil suit.

COUNT 6 - MALFEASANCE IN OFFICE

The evidence contained in the record is insufficient as a matter of law to support the verdict of finding the Defendant guilty of the offense of Malfeasance in Office (Count 6). There is no evidence in the record that the Defendant committed malfeasance in office on or about June 13, 2016 by intentionally and unlawfully using public funds to pay for an attorney for his employees during questioning in a criminal matter in which they were not targets of an investigation. There is no further evidence that the Defendant violated his lawful duty to not loan, pledge or donate to any person the funds, credit, property, or things of value of the State or any political subdivision in violation of LA Const. Art 7 Section 14, his duty to not misappropriate, misapply, convert, misuse, or otherwise wrongfully take any funds, property or other thing of value belonging to or under the custody or control of the public entity in which they hold office or are employed in violation of LA R.S. 42:1461. The employees of the Marshal's Office had been subpoenaed to appear before a court reporter at the District Attorney's Office without any indication they were only witnesses and without immunity agreements.

The jury's instructions at trial read:

- **Count 6:**
- **The Defendant:**
- **(1) Was a public officer**
- **(2) He had a duty: 1. To not unlawfully loan, pledge, or donate to or for any person or association except as allowed (and/or) 3. To not misapply, convert, misuse or otherwise wrongfully take any funds they control as the office holder.**
- **(3) That he intentional refused, failed or unlawfully performed those duties unlawfully, used, misapplied, misused and donated public money to hire a lawyer to represent Marshal Employees who were not targets of any criminal investigation.**

Good faith reliance on advice of counsel is evidence that tends to negate specific intent element of malfeasance in office is a specific intent defense this Honorable Court heard during the trial. As his former counsel , Kevin Stockstill, testified, the defendant paid these legal fees relating to the representation of the employees of the Marshal's office, concerned about why they were being subpoenaed to the District Attorney's office, at the direction of his attorney. All of them testified at trial about their anxiety and desire for legal representation.

"Q Okay. We have up here, it's already been introduced into evidence. Do you recognize this document?

A Yes.

Q Can you tell the jury what that is? You probably haven't seen it in a long time.

A Yes. It looks like an invoice from Mr. Jarrett.

Q Do you remember if Mr. Jarrett mailed or delivered this invoice to you?

A I don't recall if it was mailed or hand delivered to me.

Q Okay.

A But I would have forwarded to Marshal Pope for payment.

Q Did you recommend to the Marshal or advise him that he should pay this bill?

MR. HANEY: Your Honor, I'm going to object because I think we could be getting into some problems here.

THE COURT: All right. Ask a different question.

Q Did you advise Marshal Pope to pay this legal bill?

A I think so.

THE COURT: There's an objection based on - we can side bar.

(BENCH CONFERENCE)
(OFF THE RECORD)
BACK ON THE RECORD

BY MR. MCLINDON: (continuing)

Q Did you advise Marshal Pope to pay that legal bill?

A I did ask him to pay it."

[Trial Transcript Excerpt Kevin Stockstill, page 68, lines 1 through 30]

In *United States v. Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011)²² a pharmaceutical company former Vice President and associate counsel was indicted for allegedly withholding documents from the U.S. Food and Drug Administration during its inquiry into whether the company was promoting “off-label” uses of one of its drugs. The indictment alleged that the counsel obstructed an investigation, falsified documents, concealed documents and made false statements.

Counsel steadfastly claimed not only that she had done nothing wrong, but that some of her actions were based in part upon the advice of the company’s outside counsel. *Id.* at 558. In addition to asserting the advice-of-counsel defense at trial which resulted in the dismissal of all charges, the defense wisely asserted pretrial that the indictment was improperly obtained because prosecutors misinstructed the grand jury on the effect of relying on the advice of counsel. *Id.* at 564.²³ After an in-camera review of the grand jury transcript, the court agreed and dismissed the indictments without prejudice, concluding that the government had misinstructed the grand jury on the advice-of-counsel defense.[6] Although this case demonstrates the nightmare created by overly aggressive theories of prosecution, it also serves as a reminder of the benefit of consulting counsel, and, where proper, asserting an advice-of-counsel defense.

In reaching its conclusion the District Court reviewed a Supreme Court’s analysis *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)²⁴ for

²² Subsequently, the government re-indicted the defendant and the case proceeded to trial. After the close of the government’s evidence, the defendant moved for acquittal under Federal Rule of Criminal Procedure 29. The court granted the motion and the defendant was acquitted. *United States v. Stevens*, Judgment, No. 10-cr-00694-RWT (D. Md. May 13, 2011). The court explained its decision to grant the motion for acquittal orally, a transcript of which is available at <http://lawprofessors.typepad.com/files/110510stevens.pdf>.

²³ The District Court cited *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981) (“The reliance defense . . . is designed to refute the government’s proof that the defendant intended to commit the offense.”), *United States v. Polytarides*, 584 F.2d 1350, 1353 (4th Cir. 1978) (“The basis for the defense of action taken on the advice of counsel is that, in relying on counsel’s advice, defendant lacked the requisite intent to violate the law.”).

²⁴ The Supreme Court unanimously overturned accounting firm Arthur Andersen’s conviction of obstruction of justice in the fraudulent activities and subsequent collapse of Enron,

determining whether a statute required specific intent. *United States v Stevens*, supra at 561. The Supreme Court explained:

"[The statute] provides the mens rea — 'knowingly' — and then a list of acts — 'uses intimidation or physical force, threatens, or corruptly persuades.' We have recognized with regard to similar statutory language that the mens rea at least applies to the acts that immediately follow, if not to other elements down the statutory chain." *Id.*

Andersen, 544 U.S. at 705-706.

Clearly Marshal Pope relied on the advise of counsel to pay these legal bills and should be acquitted for lack of specific intent.

COUNT 7 - MALFEASANCE IN OFFICE

The evidence contained in the record is insufficient as a matter of law to support the verdict of finding the Defendant guilty of the offense of Malfeasance in Office (Count 7). There is no evidence contained in the record that the Defendant committed malfeasance in office on or about July 13, 2016 by intentionally using public money for an attorney for services rendered in connection with his criminal contempt hearing and supervisory writ application. There is no further evidence that the Defendant violated his lawful duty not loan, pledge or donate to any person the funds, credit, property, or things of value of the State or any political subdivision in violation of LA Const. Art 7 Section 14, his duty to not misappropriate, misapply, convert, misuse, or otherwise wrongfully take any funds, property or other thing of value belonging to or under the custody or control of the public entity in which they hold office or are employed in violation of LA R.S. 42:1461.

The jury's instructions at trial read:

- **Count 7**
- **The Defendant:**

on the basis that the jury instructions did not properly portray the law Arthur Andersen was charged with breaking. As the Arthur Andersen name had become infamous and the firm had been obligated to cease audit activities, the business was unable to recover even after the conviction was overturned in its favor.

https://en.wikipedia.org/wiki/Arthur_Andersen_LLP_v._United_States

- (1) Was a public officer
- (2) He had a duty: 1. To not unlawfully loan, pledge, or donate to or for any person or association except as allowed (and/or) 3. To not misapply, convert, misuse or otherwise wrongfully take any funds they control as the office holder.
- (3) That he intentional refused, failed or unlawfully performed those duties, unlawfully, used, misapplied, misused and donated public money to pay for a lawyer to represent him on his writ application to overturn Judge Edwards finding of criminal contempt of court.

During the trial, Kevin Stockstill testified concerning his directions to Marshal Pope that he pay the legal fees of Katherine Guillot on the appeal in the Louisiana Public Records civil lawsuit.

- Q Now, do you know a lawyer named Katherine Guillot?
- A Yes, I do.
- Q How do you know her?
- A I worked for her father, Thomas Guilbeau, for years. I've known her over the years and she practices and we've handled cases together as well.
- Q When you were representing Marshal Pope in the public records lawsuit, did you ever ask her help to assist you in any legal work?
- A Yes.
- Q Can you tell the jury about that?
- A After the contempt finding by Judge Edwards, which was, I think, on March 22, we had to do, basically, an appeal to the Third Circuit Court of Appeal. I don't particularly like to write briefs and do the research. And, so, I asked that she get involved and do that. She is good at doing research and writing briefs, so I asked that she get involved.
- Q Did she, in fact, write that writ application?
- A Yes, she did.
- Q Okay. Do you recognize that letter and the charges? Have you seen this document before?
- A It's been a while but I saw it at some point, yes.
- Q Okay. Do you remember how that bill was - do you know how Ms. Guillot got paid?
- A I remember having a conversation with her in City Court one day. I asked her whether or not her bill had been paid. She said that it had not. And my recollection is that I took the bill to the Marshal's Office and had been given it to - I can't remember her name. It's not the receptionist. I think it's the lady that handles accounting.
- Q Thank you. And she was paid for her legal work?
- A I don't remember if she was paid that day or she was paid later."

[Trial Transcript Excerpt Kevin Stockstill, page 68, line 31 through page 70, line 1]


Furthermore, during trial the evidence introduced by the State and elicited during cross-examination established that the appellate writ arose out of a civil

proceeding [*The Independent Weekly, LLC vs Lafayette City Marshal Brian Pope*, Docket No. C-2015-5737 Division B] relating to Louisiana Public Records Law requests under the provisions of LSA-R.S. 44:1 et seq., a litigation clearly relating to Brian Pope's position as the duly elected Marshal of the City Court of Lafayette. Certainly, the funds used to pay legal fees for the defense of the civil suit were legitimate expenses of the Marshal's office. Similarly, legal fees relating to appeals as part of that defense logically should also be the expenses born by the Marshal's Office. To the extent that Brian Pope lacked the specific intent to violate the statute based on acting on the advice of counsel, he should be acquitted of this charge as well.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2.1 The Defendant moves this court to set aside the jury's verdict and grant his Motion for Acquittal, or in the alternative, to review the responsive verdicts and enter a verdict to a lesser and included offense.

RESPECTFULLY SUBMITTED
BY ATTORNEYS


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion, and proposed orders, has been forwarded to the Honorable Judge David Smith, P.O. Box 503, Crowley, LA 70527-0503 by depositing same in the United States Mail, postage prepaid and properly addressed, and to ADA Alan Haney, Office of the District Attorney, 15th Judicial District Court, P.O. Box 3306, Lafayette, LA 70502-3306 via hand delivery this 18th day of March, 2019.


BRETT L. GRAYSON (06268)

STATE OF LOUISIANA : 15TH JUDICIAL DISTRICT COURT
VS. DOCKET NO.: 16-CR-159455 : PARISH OF LAFAYETTE
BRIAN L. POPE : STATE OF LOUISIANA

ORDER

Considering the foregoing Motion:

IT IS ORDERED that the State of Louisiana, through the Office of the District Attorney for the Parish of Lafayette, show cause on the ____ day of _____, 2019, at ____ o'clock __.M. why the court should not set aside the jury's verdict and grant Defendant's Motion for Judgment of Acquittal or in the alternative, to review the responsive verdicts and enter a verdict to a lesser and included offense.

SIGNED this ____ day of _____, 2019, in Lafayette, Lafayette Parish, Louisiana.

HON. DAVID SMITH, DISTRICT JUDGE
15TH JUDICIAL DISTRICT COURT

C-Atty



Brett L. Grayson LLC
ATTORNEY AT LAW

CLERK OF COURT
LAFAYETTE PARISH, LA
2019 MAR 18 AM 10:51

March 18, 2019

Honorable Louis J. Perret
Lafayette Parish Clerk of Court
Lafayette Parish Courthouse Building
Post Office Box 2009
Lafayette, Louisiana 70502-2009

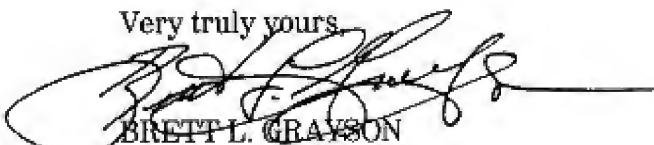
Re: *State of Louisiana*
Vs. *Brian L. Pope*
No. *2016-CR-159455*

Dear Sir:

In reference to the above captioned matter, please find enclosed herewith the following document(s) for filing and recording with your office:

1. **MOTION FOR JUDGMENT OF ACQUITTAL**
2. **ORDER**

Very truly yours,



BRETT L. GRAYSON
ATTORNEY AT LAW

BLG/cmb

Enclosure(s)

cc: Honorable David Smith
Mr. Alan Haney, ADA
Mr. Brian L. Pope

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